U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 May 2007

CASE NO.: 2007-LHC-00110
OWCP NO.: 1-121152

In the Matter Of:

R. C.[1]
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:

David N. Neusner, Esq., Embry and Neusner, Groton, Connecticut for the Claimant
Peter D. Quay, Esq., Law Office of Peter D. Quay, Taftville, Connecticut for the Employer

BEFORE: COLLEEN A. GERAGHTY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim for workers' compensation and medical benefits filed by R. C. (the "Claimant") against Electric Boat Corporation (the "Employer"), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (the

[1] In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. *See* Chief ALJ Memorandum dated July 3, 2006 available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

"Act"). The matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing before the undersigned to be held in New London, Connecticut. By letter dated February 23, 2007, the parties submitted Stipulations and a Proposed Order resolving all outstanding issues between the Employer and the Claimant. The only issue remaining for consideration is the Employer's request for Section 8(f) relief. On February 26, 2007, I issued an Order Cancelling Hearing and Establishing a Schedule for the Submission of Evidence and Briefs. Pursuant to the Order, the Claimant and the Employer submitted a Joint Exhibit package ("JX") containing two volumes, Joint Exhibits 1-12. The Employer submitted a brief addressing the Section 8(f) issue.[2]

Upon review of the evidence contained in the record and the facts set forth in the parties' Stipulation, I conclude that the Claimant is entitled to compensation benefits, the Employer is entitled to Section 8(f) relief, and Claimant's counsel is entitled to attorney fees. My findings of fact and conclusions of law are set forth below.

II. Findings of Fact and Conclusions of Law

A. Background

The Claimant, R.C., was born on July 9, 1945, making him 61 years old at the present time. JX 4 at 3. He began working at Electric Boat shipyard in Connecticut in 1974. JX 2; JX 4 at 15-16. He worked as a welder until approximately 1978 or 1979. JX 4 at 17. The Claimant returned to work at Electric Boat for four months in 1980. JX 4 at 17-21. He then traveled to Puerto Rico and worked as an auto mechanic until approximately 1989. JX 4 at 21. The Claimant returned to Electric Boat sometime in 1990 and worked until his injury on September 16, 1991. JX 4 at 21-23. Following the 1991 injury, the Claimant was out of work until January 1992. He attempted to return to work at that point and was also in physical therapy during this period. By early June 1992 the Claimant again went out as a result of the injuries sustained in 1991, and he has not returned to the workforce. JX 4 at 25-26; JX 5; JX 6. The Claimant stated that he had felt numbness in his hands after the accident and that it spread as he continued working. Following the 1991 injury, the Claimant was treated by Dr. Park. JX 5.

The Claimant testified that prior to the September 1991 injury he had suffered an earlier injury to his lower back and had undergone back surgery in 1969 for that injury. *Id*. at 8-9. The Claimant reported that approximately one year after the 1969 injury and back surgery he returned to work with no restrictions. *Id* at 13.

Following the 1991 work-injury, the Claimant saw Dr. Frank Maletz, an orthopedic surgeon, on September 1, 1992 on a referral from Dr. Park. JX 7 at 5. Dr. Maletz has currently diagnosed the Claimant with bilateral thoracic outlet syndrome, bilateral carpal tunnel syndrome, adhesive changes to his shoulder on the right, and bilateral epicondylitis of his elbows. *Id*. He has also been seen for complaints referable to his cervical spine and lumbar spine that are linked generally with lumbar and cervical syndromes. *Id*. Dr. Maletz performed carpal tunnel releases on the Complainant's hands in 1993 (right hand) and 1994 (left hand). JX 8 at 6. The response

[2] The District Director, Office of Workers' Compensation Programs, did not file a brief.

to the operations was described as "not optimal." *Id*. The Claimant also underwent surgery in 1996 to attempt to make his right shoulder more stable and functional. *Id*. at 8. This surgery also did not produce a significant improvement. *Id*. at 9. In May of 1997, Dr Maletz stated in a deposition that in his opinion, the work-related shoulders, arms, and bilateral hands conditions are not the sole cause of his total disability. JX 7 at 20.

B. Parties' Stipulation of Facts

The parties have entered into the following stipulations:

1) Their claim falls under the jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.* ("the Act").

2) An employment relationship existed between R.C. (Claimant) and Electric Boat Corporation (Employer) at all relevant times.

3) Claimant sustained an injury that arose in and out of the course and scope of his employment with the Employer on September 16, 1991. Claimant fell through a hole, spread both arms, caught himself, and thereby sustained injury to both hands, both arms and both shoulders, his right leg and cervical spine. Employer has provided reasonable and necessary medical care to Claimant for his injuries to his various body parts as a result of the injury of September 16, 1991.

4) Timely notice of the injury was provided to the Employer and a timely written claim for compensation was filed by Claimant.

5) The average weekly wage is $500.39 and the compensation rate is $333.59.

6) The Claimant is entitled to temporary total disability benefits from September 17, 1991 through and including July 9, 1995.

7) The Claimant is permanently and totally disabled from his former employment at Electric Boat.

8) The date of maximum medical improvement was July 10, 1995 according to the medical record of Dr. Frank W. Maletz, M.D.

9) The Employer intends to pursue relief under Section 8(f) of the Act. By conceding permanent and total disability to Claimant Employer is not abandoning its Section 8(f) claim.

The parties' stipulations also included the following which I find to be argument rather than a stipulation of facts.

10) The Employer makes the following summary arguments of the Section 8(f) claim. To the extent that the Claimant has standing in the 8(f) issue the Claimant joins in the statements. In

any event the Claimant agrees that the assertions made by the Employer are supported in the record of the case.

A. The Claimant suffered from a prior history of low back injury and surgery. The impairment suffered by the Claimant from his underlying back injury is a significant factor in his work incapacity. The Claimant suffers significant chronic low back problems that are contributing to his disability. The low back injury limits the Claimant to sedentary work activity and the work-related injury adds additional disability.

B. This medical opinion is supported by the vocational opinion of Paul Murgo, a certified vocational expert.

C. Philo F. Willetts, Jr., M.D. examined the Claimant on behalf of the Employer on multiple occasions. Dr. Willetts supports the opinions of Dr. Maletz that the Claimant's disability is not limited to his work-related injury. Dr. Willetts has stated that the work-related injury is not the sole cause of the ongoing disability.

D. The aforementioned conditions and injuries were longstanding and serious disabilities that predated the injury of September 16, 1991.

E. The said underlying conditions contributed in a material and substantial fashion to the present disability and rendered the Claimant more disabled than he would have been from the injury of September 16, 1991 alone.

F. The Claimant's ongoing and total disability is not solely attributable to the injury of September 16, 1991. Rather Claimant's disability is as a consequence of a multitude of factors many of which predate the injury of September 16, 1991.

I have reviewed these stipulations in light of the entire record, and I adopt stipulations 1-9 as my findings.

C. Compensation Benefits

Based upon the above stipulations and findings of fact, the Claimant is entitled to compensation benefits for temporary total disability pursuant to 33 U.S.C. §908(b) at a rate of 66 2/3 percent of his average weekly wage of $500.39 from September 17, 1991 to July 9, 1995. The Claimant is also entitled to permanent total disability pursuant to 33 U.S.C. §908(a) at a rate of 66 2/3 percent of his average weekly wage of $500.39 beginning on July 10, 1995 to the present and continuing. The Claimant is also entitled to annual cost of living adjustments beginning October 1, 1996.

D. Entitlement to Special Fund Relief

The Employer has applied for Special Fund Relief under Section 8(f) of the Act which provides that where an employee with an existing permanent partial disability suffers a subsequent injury resulting in a total permanent disability which is not solely attributable to the

subsequent injury, an employer's liability for payment of benefits under the Act is limited to no greater than a period of 104 weeks with the remaining compensation paid by a Special Fund established pursuant to 33 U.S.C. §944. 33 U.S.C. §908; *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). To avail itself of relief under this provision, an employer or insurance carrier must file an application with the District Director (formerly the Deputy Commissioner) of the Department of Labor's Office of Worker's Compensation Programs (OWCP) pursuant to section 8(f)(3) which, as amended, provides:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3). The record shows that the Employer submitted a petition for Special Fund relief on July 26, 2006, when the claim was pending before the District Director. The District Director reviewed and denied the application by letter dated August 21, 2006, on the grounds that there was no medical evidence showing that the Claimant's subsequent injury alone would not have caused the Claimant's total permanent disability. Therefore, the Employer's request for Section 8(f) relief was timely filed and I will proceed to the merits of the Employer's application.

In addition to timely filing a sufficiently documented application, an employer in a permanent and total disability case must meet three requirements to avail itself of Section 8(f) relief: (1) the employee must have a pre-existing permanent partial disability; (2) the pre-existing disability must have been manifest to the Employer; (3) the employee's permanent total disability must not be solely due to the subsequent injury. *Director, OWCP v. General Dynamics Corp.,* 982 F.2d 790, 793 (2nd Cir. 1992) (*Bergeron*); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305 (2nd Cir. 1992) (*Luccitelli*).

The Employer asserts in its petition and brief that the Claimant had a prior back injury which resulted in back surgery in 1969 to remove a herniated disc at the L-5-S1 level followed by a fusion. JX 3 at 3. The Claimant missed a year of work following the surgery. JX 4 at 9. The Claimant was then able to return to work without restrictions. JX 4 at 13. He worked as an auto mechanic and a welder for several years following the 1969 surgery without any restrictions on his activities. JX 4. The Claimant's orthopedic surgeon, Dr. Maletz, testified that over the course of his treatment of the Claimant, in addition to injuries sustained as a result of the 1991 work-injury, he had seen the Claimant for complainants related to the lumbar spine condition which Dr. Maletz opined was degenerative in nature but was also related to the 1969 lumbar spine surgery. JX 7 at 5-6, 13-14; JX 6 at 46-47, 49. Dr. Maletz also stated that the Claimant had a 50% loss of motion in his lower lumbar spine that had progressed over the years. *Id*. Dr. Maletz stated that the lumbar spine condition diminishes the Claimant's ability to sit for periods of time. JX 7 at 8-11. While the Claimant's lumbar spine was asymptomatic for several years

following the 1969 surgery, by 1997 he was experiencing pain and reduced range of motion in the lumbar spine. His prior non-work-related back injury requiring surgery was certainly the type of injury that could cause a cautious employer to discharge the employee because of a greater risk of an employment-related injury. *C&P Telephone Co. v. Directors, OWCP,* 564 F.2d 503, 531 (D.C. Cir. 1977). Therefore, I conclude that the Employer has satisfied the first requirement that the Claimant have a pre-existing permanent partial disability.

Regarding the second requirement, the Board held that, "[i]t is well established that a pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury, employer had actual knowledge of the condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." *Esposito v. Bay Container Repair Co.*, 30 BRBS 67, 68 (1996). In this case, I find that the Employer had knowledge of the Claimant's pre-existing back disability since the Claimant informed the Employer of his prior back surgery during his pre-employment physical examination when he was initially hired in December 1974 by General Dynamics, and additionally, there were medical records in existence prior to the Claimant's 1991 work-related injury from which the pre-existing back condition was objectively determinable. Therefore, I find that the Claimant's pre-existing permanent partial disability was manifest to the Employer.

The third and final requirement is that the Employer must establish that the Claimant's current permanent and total disability is not solely attributable to the September 16, 1991 upper extremity injury which ultimately forced him to stop working in June 1992. That is, the Employer "must show, by medical or other evidence, that a claimant's subsequent injury *alone* would not have caused the claimant's total permanent disability." *Luccitelli*, 964 F.2d at 1306 (italics in original). "[T]he proper standard for assessing the significance of the prior disability in relation to the current disability is whether the evidence establishes that 'Claimant's disability is due to a combination of his preexisting condition and subsequent work injury.'" *Bergeron.,* 982 F.2d at 792. Dr. Maletz has been treating the Claimant since 1992. JX 7 at 5. Dr. Maletz notes that the Claimant had prior back surgery in 1969, and bilateral carpal tunnel release surgeries and right shoulder surgery following the 1991 work injury. JX 8 at 6, 8.

In a patient follow-up report dated March 20, 1997, Dr. Maletz noted that the Claimant's lower lumbar spine revealed a 50% loss of range of motion in extension. JX 6 at 43. Again on January 19, 1998, Dr. Maletz noted that the Claimant's lumbar spine was extremely stiff and he experienced pain symptoms in the right hip. *Id*. at 45. By May 1998, Dr. Maletz reported that the Claimant was unable to sit, or stand for more than 10 minutes. *Id*. at 46. His lumbar spine had become more symptomatic and walking caused pain in both legs. *Id*. Two days prior to this report, Dr. Maletz stated in a deposition that the Claimant's pre-existing back condition plays a role in his current disability and that if the Claimant was sitting to perform a sedentary job, functioning for long periods of time would be precluded by his lower back pain. *Id*. at 12-13. Dr. Maletz opined that the underlying back condition was aggravated as the Claimant was using his back more to compensate for the limitations in his hands as a result of the 1991 work-injury. JX 6; JX 12. In a report dated May 13, 2002, Dr. Philo Willetts stated that the September 1991 injury is "certainly" not the sole cause of the Claimant's injury. JX 12 at 17. Although Dr. Willetts had not examined the Claimant's back, he stated that the lumbar injury would likely require work restrictions on activities such as bending and lifting. *Id*. In addition, Mr. Paul

Murgo, a Certified Vocational Rehabilitation Counselor, explained in a letter dated May 11, 1998, that the lumbar injury was a factor in preventing the Claimant from performing even sedentary work as the Claimant is not able to sit for six hours out of an eight hour workday. JX 10 at 1.

The evidence establishes that, although the 1991 work-injury to the upper extremities precluded several jobs, it was the combination of the 1991 work-related injury and the prior 1969 back injury that precluded all competitive employment, rendering the Claimant totally disabled. Accordingly, I find that the Claimant's subsequent injury of September 16, 1991 alone did not cause his present permanent and total disability.

E. Attorney's Fees

Having successfully established his right to compensation and medical benefits, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976); *Ingalls Shipbuilding v Director, OWCP*, 920 F.2d 163, 166 (5th Cir. 1993). By letter dated March 12, 2007, the Claimant's attorney filed an itemized application for attorney's fees and costs in the amount of $954.50. The Employer's attorney, by letter dated March 12, 2007, objected to the fee application and requested a reduction of $37.50 to reflect a billing rate of $261.00 per hour instead $271.00 per hour for attorney fees and a billing rate of $73.00 per hour instead of $77.00 per hour for paralegal fees. Counsel seeks payment for 2.75 hours of counsel time at $261 per hour which results in a reduction of fees for attorney time by $27.50. Paralegal time sought is 2.75 hours and at $73 per hour results in a reduction of $11.00 in the amount the fee application seeks for paralegal services for a total reduction of $38.50 in the fee sought.[3] The Claimant's attorney did not respond, and therefore did not meet his burden of proving the necessity of raising the rates with new facts or arguments. In any event, I note that judges in the Boston District of the Office of Administrative Law Judges have previously decided that $261.00 per hour is a reasonable billing rate for LHWCA work performed in Connecticut. *See Chandler v. Electric Boat Corp.,* Case Nos. 2005-LHC-02251 & 2005-LHC-02252 (Supp. Dec. & Ord. Award. Atty. Fees Jan. 18, 2006); *Blocker v. Electric Boat Corp.,* Case No. 2005-LHC-02299 (Supp. Dec. & Ord. Award. Atty. Fees Jan. 17, 2006); *DeSautels v. Electric Boat Corp.,* Case No. 2004-LHC -01719 (Dec. & Ord. Award. Atty. Fees February 10, 2006); *Dawkins v. Electric Boat Corp.,* Case Nos. 2006-LHC-01765 & 2007-LHC 00189 (Supp. Dec & Ord. Award. Atty. Fees January 22, 2007). The Boston Judges have also recently denied requests by Attorney Neusner's firm to increase his hourly rate to $271.00 per hour effective October 1, 2006. *See Ruhe v. Electric Boat Corp.,* Case No. 2006-LHC-01628 (Supp. Dec. & Ord. Award. Atty. Fees December 5, 2006); *Dawkins v. Electric Boat Corp.,* Case Nos. 2006-LHC-01765 & 2007-LHC 00189 (Supp. Dec & Ord. Award. Atty. Fees January 22, 2007). In summary, the Claimant's attorney did not respond to the Employer's objections to the hourly rates sought for attorney and paralegal fees and the objection is sustained. Accordingly, the Claimant is entitled to an award of $916.00 in attorney fees.

[3] Employer's counsel has stated that the fee application was to be reduced by a total of $37.50. However, after sustaining the Employer's objections to the fee application the total fees are reduced by $38.50.

III. ORDER

Based upon the Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order:

1. The Employer shall pay the Claimant compensation benefits for temporary and total disability pursuant to 33 U.S.C §908(b) at a rate of 66 2/3 percent of his average weekly wage of $500.39 from September 17, 1991 through July 9, 1995;

2. The Employer shall pay the Claimant compensation benefits for permanent and total disability pursuant to 33 U.S.C §908(a), at a rate of 66 2/3 percent of his average weekly wage of $500.39 beginning on July 10, 1995 to the present and continuing. The Claimant is also entitled to annual cost of living adjustments beginning October 1, 1996;

3. The Employer is entitled to a credit for compensation payments made to the Claimant since July 10, 1995;

4. Effective with the expiration of the 104 week period which commenced on July 10, 1995, the Claimant's continuing permanent total disability compensation benefits shall be paid, pursuant to 33 U.S.C. § 908(f), from the Special Fund established under 33 U.S.C. § 944 until further order;

5. The Employer shall provide all reasonable and necessary medical care required by the Claimant for his work-related upper extremity injuries;

6. The Employer shall pay to the Claimant's counsel, David Neusner, attorney fees and costs in the amount of $916.

7. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts